(2)

No. 06-1212

FILED
MAR 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TWO TREES, a New York general partnership,
DAVID C. WALENTAS and JANE WALENTAS,

Petitioners,

v.

BUILDERS TRANSPORT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

DENNIS CONNOLLY
Counsel for the Official Creditors' Committee
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7269

DAVID BISBEE
Counsel of Record
2929 Tall Pines Way
Atlanta, GA 30345
(770) 939-4881

Attorneys for Respondent

207580

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion does not conflict with a decision of this Court or another Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Builders Transport, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
FEDERAL STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
A. Facts	1
B. The Litigation Below	3
C. The Circuit Court Appeal	4
REASONS FOR DENYING THE PETITION	5
A. The Eleventh Circuit did not eviscerate the "independence principle"	5
B. The Eleventh Circuit decision is consistent with the Fifth Circuit's *Stonebridge* decision	6
CONCLUSION	7

TABLE OF CITED AUTHORITIES

Page

Cases:

All Services Exportacao, Importacao Comercio, S.A. v. Banco Bamerindus, 921 F.2d 32 (2d Cir 1990) 5

Compton Corp., In re 831 F.2d 586 (5th Cir. 1987) ... 5

Eakin v. Continental Illinois Nat. Bank & Trust Co. Of Chicago, 875 F.2d 114 (7th Cir. 1989) 5

EOP-Colonnade of Dallas Ltd. Partnership v. Faulkner (In re Stonebridge Technologies, Inc.), 430 F.3d 260 (5th Cir. 2005) 4, 6

Graham Square, Inc., In re 126 F.3d 823 (6th Cir. 1997) 5

Insurance Co. of North America v. Heritage Bank, N.A., 595 F.2d 171 (3d Cir. 1979) 5-6

Itek Corp. v. First Nat. Bank of Boston, 730 F.2d 19 (1st Cir. 1984) 5

KMW International v. Chase Manhattan Bank N.A., 606 F.2d 10 (2d Cir. 1979) 5

Resolution Trust Corp. v. United Trust Fund, 57 F.3d 1025 (11th Cir. 1995) 4, 5, 7

OPINIONS BELOW

In its opinion reported at 471 F.3d 1178 (11th Cir. 2006), the Eleventh Circuit Court of Appeals affirmed the decisions of the District Court and Bankruptcy Court as follows: (1) the July 7, 2003 Order of the District Court for the Northern District of Georgia affirming the September 30, 2002 Order granting partial summary judgment of the Bankruptcy Court for the Northern District of Georgia; and (2) the September 30, 2005 Order of the District Court for the Northern District of Georgia affirming the July 15, 2004 Judgment of the Bankruptcy court

FEDERAL STATUTES INVOLVED

Title 11 U.S.C. §§ 541(a)(1), 542(b) and 502(b)(6).

STATEMENT OF THE CASE

A. Facts

Builders Transport, Inc. (hereinafter "BTI") was in the interstate trucking business. In 1995 BTI entered into a sale and leaseback transaction with Two Trees, pursuant to which BTI's headquarters building was sold to Two Trees for $3,500,000 and leased back to BTI for a five-year term.[1]

In order to finance the purchase, Two Trees borrowed $3,500,000 from CIT Business Credit, Inc. (hereinafter "CIT"). Two Trees' general partner, David Walentas guaranteed the mortgage indebtedness to CIT and Two Trees pledged both the building and the BTI lease to CIT as security for the mortgage loan.

---

1. Contrary to the assertion of Petitioners, there is no evidence in the record below that the value of the building was less than $3,500,000.

In connection with the *lease* BTI obtained a letter of credit in the amount of $1,600,000 in favor of Two Trees which was to serve as "additional assurance of the payment by Lessee of all amount of rent and other obligations payable by Lessee" *under the lease.*[2] BTI never agreed to be liable, or signed any document making it liable, for the Two Trees indebtedness to CIT.

CIT was also a lender to BTI under various entirely separate loan facilities, including a facility for letters of credit. The letter of credit issued in favor of Two Trees was actually issued by a third party bank and guaranteed by CIT, pursuant to one of the BTI loan facilities with CIT.

Following BTI's bankruptcy filing, CIT, as assignee of Two Trees, drew down the $1,600,000 under the letter of credit, and applied the $1,600,000 to Two Trees mortgage indebtedness to CIT. Simultaneously, CIT, in its capacity as lender to BTI and guarantor to the bank issuing the letter of credit, paid $1,600,000 to the bank and added the $1,600,000 to the amount owed CIT by BTI. Subsequently, BTI repaid *all* amounts it owed CIT under the BTI/CIT loan facilities, including the $1,600,000 drawn under the letter of credit and applied by CIT to the Two Trees mortgage debt.

---

2. Contrary to the assertion of Petitioners, there is no evidence that the letter of credit "stood as security for both the lease and the mortgage . . ." Further there is no evidence that the letter of credit was given based upon a "shared understanding and belief that it would not be affected by bankruptcy . . ."

B. The Litigation Below

BTI filed suit in the Bankruptcy court against Petitioners Two Trees, David Walentas and Jane Walentas, and against CIT, seeking to recover that portion of the letter of credit proceeds which exceeded the allowable damages recoverable by Two Trees *under the lease*. Having repaid the full amount drawn under the letter of credit, BTI was seeking to recover the excess funds which were applied by CIT to the Two Trees mortgage debt — a debt for which BTI had no liability.[3]

Petitioners and CIT defended this action asserting a variety of defenses including (1) the "independence principle"; (2) that the lease was in reality a financing transaction; and (3) that BTI was impliedly liable for the Two Trees mortgage debt to CIT. Motions for summary judgment were filed by the parties and on September 30, 2002 the Bankruptcy Court granted partial judgment to BTI on the issue of liability, reserving determination of the amount to which BTI was entitled. The District Court Affirmed this grant of partial summary judgment by Order dated July 7, 2003.

The issue of damages was submitted to the Bankruptcy Court on stipulated facts. On July 15, 2004, the Bankruptcy Court entered judgment for BTI in the amount of $1,175,995.44. The Bankruptcy Court arrived at this amount by determining Two Trees maximum damage claim for the remaining life of the lease to be $424,004.56.[4] Since this

3. At no time did BTI attempt to thwart the *draw* on the letter of credit or assert that the *draw* on the letter of credit was improper.

4. The Bankruptcy Court set this amount by adding together the rent, taxes, insurance and repair/maintenance costs for the remaining life of the lease, 15 months, 9 days. The Court did not apply the 12 month limitation contained in § 502(b)(6), Title 11 U.S.C.

was the total amount of damages Two Trees or CIT could ever recover under the lease, the Bankruptcy Court properly held that BTI was entitled to a return of the balance of the letter of credit proceeds. Since the full amount of the draw on the letter of credit, including the overdraw, had been repaid by BTI from assets of the bankruptcy estate, the excess funds retained by CIT, and improperly applied to the Two Trees mortgage debt, were property of the estate recoverable by BTI. The District Court affirmed the damage award by Order entered September 30, 2005.

C. The Circuit Court Appeal

Two Trees initially appealed the District Court's July 7, 2003 Order affirming the grant of partial summary judgment, but the Eleventh Circuit Court of Appeals declined to hear the matter as interlocutory in nature.

Two Trees then appealed both the District Court July 7, 2003 Order and September 30, 2005 Order to the Eleventh Circuit court of Appeals. The Court of Appeals affirmed, correctly noting that the Fifth Circuit Court of Appeals decision in *EOP-Colonnade of Dallas Ltd. Partnership v. Faulkner (In re Stonebridge Technologies, Inc.)*, 430 F.3d 260 (5th Cir. 2005) (hereinafter "*Stonebridge*") did not dictate a different result. The Eleventh Circuit Court of Appeals properly found the *Stonebridge* decision (i) did not address the issue of determination of the right to proceeds of a letter of credit pursuant to the underlying contract[5], and (ii) holding

5. The Eleventh Circuit followed existing authority that distinguished between the "independence principle" barring interference with the *draw* on a letter of credit, and an action to recover proceeds of a letter of credit based on entitlement thereto pursuant to the underlying contract. *Resolution Trust Corp. v. United Trust Fund*, 57 F.3d 1025 (11th Cir. 1995).

regarding § 502(b)(6) was not an issue, since the Bankruptcy Court here did not apply § 502(b)(6).

REASONS FOR DENYING THE PETITION

Petitioners seek review of a decision that is squarely the majority rule. Further, Petitioners assert that there is a conflict in the Circuit Courts of Appeal when such a split does not exist.

A. The Eleventh Circuit did not eviscerate the "independence principle."

Petitioners, as they did in the Courts below, misapply the "independence principle." The "independence principle applies only to the right to *draw* on a letter of credit, not to the ultimate entitlement to the proceeds. The very name of the principle is derived from the fact that the right to draw on the letter of credit is "independent" of the rights under the contract which the letter of credit is given to secure. There is no split of authority among the Circuit Courts of Appeal on this point. All Circuits agree that the "independence principle" has no application to determination of who is ultimately entitled to the proceeds once draw on the letter of credit has been made. *See In re Graham Square, Inc.*, 126 F.3d 823 (6th Cir. 1997); *Resolution Trust Corp. v. United Trust Fund*, 57 F.3d 1025 (11th Cir. 1995); *All Services Exportacao, Importacao Comercio, S.A. v. Banco Bamerindus*, 921 F.2d 32 (2d Cir 1990); *Eakin v. Continental Illinois Nat. Bank & Trust Co. of Chicago*, 875 F.2d 114 (7th Cir. 1989); *In re Compton Corp.*, 831 F.2d 586 (5th Cir. 1987); *Itek Corp. v. First Nat. Bank of Boston*, 730 F.2d 19 (1st Cir. 1984); *KMW International v. Chase Manhattan Bank N.A.*, 606 F.2d 10 (2d Cir. 1979); *Insurance Co. of North America*

v. Heritage Bank, N.A., 595 F.2d 171 (3d Cir. 1979). The Eleventh Circuit below correctly noted that this dispute was over the entitlement to the proceeds of a letter of credit after the proceeds had been received and applied. Thus the "independence principle" had no application.

B. The Eleventh Circuit decision is consistent with the Fifth Circuit's *Stonebridge* decision.

The *Stonebridge* decision by the 5th Circuit Court of Appeals does not, despite Petitioners efforts, require a different result in this matter. In *Stonebridge* the 5th Circuit addressed the issue of whether or not the damage limitation provisions in § 502(b)(6), Title 11 U.S.C. applied to a landlord's claim when the landlord had not filed a proof of claim in the bankruptcy case. That issue is not present in the instant appeal.[6] Here, the Bankruptcy Court did not apply § 502(b)(6) at all. The Bankruptcy Court calculated Petitioners' damages through the end of the lease, 15 months and 9 days, and allowed damages at the full amount. There is no inconsistency between the *Stonebridge* decision and the 11th Circuit's decision. In both cases the Courts held that the landlord was entitled to recover the full amount of its damages from the letter of credit, without regard to the § 502(b)(6) limitation. In the *Stonebridge* case, the landlord's damages equaled or exceeded the amount of the letter of credit; in this case the landlord's damages were less than the letter of credit amount. The 5th Circuit simply did not address

---

6. Indeed another distinction between *Stonebridge* and the instant case is that BTI was seeking to recover the excess letter of credit proceeds from CIT (lender to Two Trees on one debt and lender to BTI on an entirely separate debt), which had applied the proceeds to an indebtedness of Two Trees. This removes the instant case from the standard landlord/tenant dispute.

the controlling issue in this case, *i.e.*, who is entitled to the excess amount drawn under a the letter of credit when the proceeds exceed the maximum amount due pursuant to the underlying contract. *See Resolution Trust Corp. v. United Trust Fund, supra.* Accordingly, there is no conflict between the two decisions.

Petitioners' position in this matter has always been, and continues to be, that BTI should be held liable on Two Trees obligation to CIT, despite the fact that BTI never guaranteed such debt.

CONCLUSION

Petitioners have not established any compelling reason for the Petition to be granted. There is no conflict between the decision of the Eleventh Circuit Court of Appeals and any other Circuit Court of Appeals, including the Fifth Circuit in *Stonebridge*, and, consequently, no reason for this Court to grant review of this matter.

Respectfully submitted,

DENNIS CONNOLLY
Counsel for the Official Creditors' Committee
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7269

DAVID BISBEE
Counsel of Record
2929 Tall Pines Way
Atlanta, GA 30345
(770) 939-4881

Attorneys for Respondent